UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AFFILIATED FM INSURANCE CO., Plaintiff, v. LTK CONSULTING SERVICES, INC., Defendant.	CASE NO. C06-1750JLR ORDER DENYING PLAINTIFF'S MOTION FOR RECUSAL

I. INTRODUCTION

Before the court is Plaintiff Affiliated FM Insurance Company's ("AFM") motion for recusal. (Mot. (Dkt. # 140).) Having reviewed AFM's motion, the declaration filed in support of the motion (Scanlon Decl. (Dkt. # 142)), the balance of the record, and the applicable law, the court declines to voluntarily recuse itself and therefore DENIES AFM's motion.

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II. BACKGROUND

This action arises out of a fire that occurred on May 31, 2004, and damaged the Blue and Red Trains of the Seattle Monorail System ("SMS"). AFM originally filed its complaint against Defendant LTK Consulting Services, Inc. ("LTK"), as a subrogee of SMS, in King County Superior Court for the State of Washington on November 7, 2006. (Compl. (Dkt. # 1) at 5.) On December 7, 2006, LTK removed the action to federal district court. (*See id.* at 1-3.)

In a prior order, the court summarized AFM's negligence claim as follows:

> In their complaint, AFM alleges that "[t]he electrical ground fault responsible for causing the fire in the Blue Train on May 30, 2004 would have been avoided if the electrical grounding system for the Blue Train had not been changed at the direction of LTK Engineering in 2002," and "LTK . . . negligently failed to exercise ordinary care in changing the electrical grounding system for the Blue and Red Trains . . . in 2001 and 2002." (Compl. [(Dkt. # 1)] ¶¶ 3.3, 4.2.) However, in its November 30, 2011 responses to LTK's requests for admission, AFM stated that "[d]iscovery to date has uncovered that, in fact, the City of Seattle contracted with defendant to refurbish the Seattle Monorail System first in 1990 and 1997," and that "[w]hen defendant contracted with the City of Seattle in 1990 and 1997, the Grounding System for the Blue Train was a floating ground system." (3/30/12 Wahtola Decl. (Dkt. # 52) ¶ 22 & Ex. 3.) AFM provided similar answers on December 7, 2011 in response to LTK's interrogatories indicating that during 1997 "LTK approved the modification of the train grounding scheme from a 'floating body' design to a 'body ground to negative rail' design," and this change "represented a fundamental change in the grounding system that affected its function, maintenance and operating procedures, and safety for both staff and passengers." (*Id.* Ex. 5 at 2-4.)
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> AFM's expert reports apparently build on the theory of liability outlined in AFM's November and December 2011 discovery responses. AFM's expert reports suggest that LTK was negligent because (1) LTK allegedly changed a "floating" grounding system on the SMS to a "grounded" grounding system in 1997 or 1998, and (2) LTK allegedly

> failed to change the "grounded" grounding system back to a "floating" grounding system in 2001. (AFM Expert Discl. Ex. 2.)

(5/25/12 Order (Dkt. # 96) at 4-5.) AFM has acknowledged the forgoing description to be an "apt[] summar[y]" of its negligence claim. (*See* Mot. at 3.) Thus, according to AFM and its expert witnesses, there are two aspects to AFM's negligence claim—(1) LTK's alleged change of the grounding system from floating to grounded in 1997 or 1998 and (2) LTK's alleged failure to change the grounded system back to a floating system in 2001.[1]

On June 14, 2012, the court dismissed AFM's negligence claim on summary judgment based on the statute of limitations found in RCW 4.16.080.[2] (SJ Ord. II (Dkt. # 102).) This court found that all aspects of AFM's negligence claim were barred by the statute of limitations. (*See generally* SJ Ord. II (Dkt. # 102).) AFM appealed the court's

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[1] In its present motion for recusal, AFM again acknowledges these "two facets to [its] negligence claim against defendant." (*See* Mot. at 7-8 ("First, plaintiff's experts have opined that defendant was negligent in changing the grounding system for the Monorail in 1998 from a floating system to a bonded system. Second, plaintiff's experts have opined defendant was negligent in the 2001/2002 time frame in refusing to change the grounding system back to the original floating system from the bonded system.").)

[2] Earlier in the litigation, on July 24, 2007, the court granted LTK's first motion for summary judgment based on Washington State's economic loss doctrine. (*See* SJ Ord. I (Dkt. # 21).) AFM appealed the court's order to the Ninth Circuit Court of Appeals. (Not. of App. I (Dkt. # 25).) In 2009, the Ninth Circuit decided to certify a question concerning Washington's economic loss doctrine to the Washington Supreme Court. (9th Cir. Op. I (Dkt. # 33) at 2-3.) On November 4, 2010, the Washington Supreme Court issued two new decisions reinterpreting its prior jurisprudence with regard to the economic loss doctrine, and announcing a new rule denominated the "independent duty doctrine." *See Eastwood v. Horse Harbor Found., Inc.*, 241 P.3d 1256 (Wash. 2010); *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 243 P.3d 521 (Wash. 2010). On December 29, 2010, based on the Washington Supreme Court's opinions, the Ninth Circuit reversed this court's ruling on summary judgment and remanded for further proceedings. (9th Cir. Op. I at 3; Mandate (Dkt. # 38).)

order to the Ninth Circuit. (Not. of App. II (Dkt. # 104).) On May 22, 2013, the Ninth Circuit reversed the court's dismissal based on the statute of limitations and remanded the case. Specifically, the Ninth Circuit stated:

> To the extent Plaintiff claims that the fire was caused by LTK's alleged negligence in changing from a floating to a bonded grounding system in 1998, the district court correctly concluded that Plaintiff's claim is time-barred. But Plaintiff's theory, at least in part, is that the negligence occurred in the design and installation of the terminal board in 2001 and 2002, and that the redesigned terminal board was the proximate cause of the fire that is the subject of the suit. Therefore, Plaintiff argues the statute of limitations did not commence until the fire occurred in 2004. Because the suit was filed in 2006, Plaintiff contends that the suit was timely filed.
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> Defendant argues that the design issues predated the installation of the terminal board and that a series of electrical incidents, including at least one that post-dated the terminal board installation, were sufficient actual injury to trigger the running of the limitations period. There are genuine issues of material fact as to whether the monorail sustained "actual and appreciable" harm after the terminal board was installed. . . . Given the disputed facts, and drawing the inferences in favor of the plaintiff, we conclude that genuine issues of material fact exist precluding summary judgment.

(9th Cir. Op. II (Dkt. 137) at 3-4.)

Following remand and the Ninth Circuit's issuance of its mandate, the court issued an order on June 20, 2013, directing the parties to file a joint status report concerning when the matter would be ready for trial and also directing the parties to address whether there were any remaining legal issues that the court should address or remaining discovery that the parties should conduct prior to trial. (6/20/13 Order (Dkt. # 139) at 2.) In the course of its order, the court summarized the Ninth Circuit's ruling as follows:

> The court directs the parties to file a joint status report indicating when this matter will be ready for trial on Plaintiff's remaining claim concerning the alleged "negligence [that] occurred in the design and installation of the terminal board in 2001 and 2002, and [whether] the redesign and

> installation of the terminal board was the proximate cause of the fire that is the subject of the suit." (*See* 9th Cir. Mem. (Dkt. # 137) at 3.) Pursuant to the Ninth Circuit's ruling, factual issues regarding whether this claim is time-barred remain for trial. (*Id*. ("There are genuine issues of material fact as to whether the monorail sustained 'actual and appreciable' harm after the terminal board was installed."). However, also pursuant to the Ninth Circuit's ruling, any claim that the fire was caused by Defendant LTK Consulting Services, Inc.'s alleged negligence in changing the Seattle Monorail System from a floating to a bonded grounding system is time-barred. (*Id*.)

(*Id.* at 1-2.)

On June 24, 2013, AFM filed its present motion for recusal pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455. (*See generally* Mot.) AFM asserts that its motion is based on the court's May 1, 2012, order addressing certain discovery issues (Dkt. # 82), its May 25, 2012, order denying LTK's motion to strike AFM's expert witness disclosures and granting AFM's motion to compel (Dkt. # 96), its June 14, 2012, order granting LTK's motion for summary judgment with respect to the statute of limitations (Dkt. # 102), and its June 20, 2013, order requesting a joint status report (Dkt. # 139), along with the May 22, 2013 memorandum decision of the Ninth Circuit (Dkt. # 137). (Mot. at 1-2.) AFM's primary concern, however, is the court's statement in its June 20, 2013, order that "any claim that the fire was caused by Defendant LTK Consulting Services, Inc.'s alleged negligence in changing the Seattle Monorail System from a floating to a bonded grounding system is time-barred." (*See* Mot. at 8.) AFM asserts that, because the court failed to indicate that this alleged negligence occurred in 1998, this statement "displays such a deep-seated antagonism towards [AFM] and [AFM's] claims in this lawsuit as to render fair judgment by this [c]ourt impossible in this case." (*Id.*)

III. ANALYSIS

"The substantive standard for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455 is the same: Whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012) (quoting *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (per curiam) (brackets and internal quotation marks omitted)). "Ordinarily, the alleged bias must stem from an 'extrajudicial source.'" *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (quoting *Liteky v. Untied States*, 510 U.S. 540, 554-56 (1994)). "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion." *Hernandez*, 109 F.3d at 1454. Moreover, "[p]arties cannot attack a judge's impartiality on the basis of information and beliefs acquired while acting in his or her judicial capacity." *McTiernan*, 695 F.3d at 891 (quoting *United States v. Frias-Ramirez*, 670 F.2d 849, 853 n.6 (9th Cir. 1982)). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

AFM has not demonstrated or even suggested any "extrajudicial source" for the court's alleged bias. Nor does AFM demonstrate any deep-seated favoritism or antagonism on the part of the court toward the parties that would make fair judgment impossible. AFM states that it bases its motion on four of the court's prior orders. However, the outcomes in these orders are mixed with court ruling in both AFM's and

LTK's favor depending on the law and facts presented by the parties.[3] Based on this record, AFM does not approach demonstrating the type of "deep-seated favoritism or antagonism that would make fair judgment impossible" by this court. *See Liteky*, 510 U.S. at 555.

Neither does the fact that the Ninth Circuit has entered orders reversing and remanding this action demonstrate that this court harbors deep-seated favoritism or antagonism toward any of the parties.[4] "Adverse rulings do not constitute the requisite bias [to necessitate recusal] . . . even if they were erroneous." *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983) (citations omitted) (Judge's error in hasty acceptance of an invalid guilty verdict in the first trial or even his announcement in open court of his own belief in the defendant's guilt did not require recusal). The court recognizes that fair-minded judges can differ with respect to outcomes, and that the review and

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[3] The court entered one of the orders at issue entirely in AFM's favor. (*See* 5/25/12 Order (Dkt. # 96) (denying LTK's motion to strike AFM's expert witness disclosures and granting AFM's motion to compel). The court entered another of the orders in favor of LTK in part and in favor of AFM in part. (*See* 5/1/12 Order (Dkt. # 82) (granting LTK's motion for an extension of time, granting in part and denying in part LTK's motion to compel discovery and overrule AFM's objection to a subpoena, and denying LTK's motion for Rule 37 sanctions against AFM or to deem facts admitted).) The only order cited by AFM that the court entered entirely against AFM was the court's order granting LTK's motion for summary judgment with respect to the statute of limitations. (*See* 6/14/12 Order (Dkt. # 102).)

[4] As noted above, one of the Ninth Circuit's reversals came in the context of the Washington Supreme Court's reinterpretation of its prior jurisprudence with regard to the economic loss doctrine and the announcement of a new rule denominated as the "independent duty doctrine." (*See supra* note 1.) In the second reversal, the Ninth Circuit agreed in part with this court's assessment of the case and disagreed in part. (*See* 9th Cir. Op. II at 3 ("To the extent Plaintiff claims that the fire was caused by LTK's alleged negligence in changing from a floating to a bonded grounding system in 1998, the district court correctly concluded that Plaintiff's claim is time-barred.").)

occasional reversal and remand of its decisions by the Ninth Circuit is part of our court system and judicial process. There is nothing in this court's record or the record of this case to suggest otherwise, and AFM has not presented any evidence so indicating.

Finally, AFM relies most heavily upon the court's June 20, 2013, order directing the parties to submit a joint status report. (*See* Mot. at 8-11.) AFM finds bias in the court's failure to note that AFM's time-barred claim concerning LTK's alleged negligence in changing the SMS from a floating to a grounded system occurred in 1998. (*See* Mot. at 5-6.) The fact, however, that AFM asserts that this alleged act occurred roughly in 1998 is firmly established not only in this court's prior orders, but in the Ninth Circuit's memorandum decision as well. (*See, e.g.*, 5/25/12 Order at 4-5; 9th Cir. Op. II at 3-4.) There was no need for the court to repeat this fact in the context of its order directing the parties to submit a joint status report, nor does its failure to do so demonstrate any "deep-seated favoritism or antagonism" toward either LTK or AFM.

Moreover, nothing in the court's June 20, 2013, order diverges from the Ninth Circuit's ruling. As the Ninth Circuit's memorandum decision clarifies, AFM's remaining claim arises out of LTK's alleged negligent conduct in the 2001/2002 timeframe. (9th Cir. Op. II at 3.) Depending on the development of evidence at trial or otherwise, AFM's claim with respect to LTK's alleged negligence during that time period may involve the design and installation of the terminal board and LTK's alleged failure to change the bonded grounding system back to a floating design in conjunction therewith. Whether AFM's negligence claim involving LTK's alleged conduct and failures in 2001 and 2002 is time-barred is reserved for trial. However, as the Ninth Circuit has held,

AFM's claim based on LTK's alleged negligence in originally changing the Seattle Monorail System from a floating to a bonded grounding system in 1998 is time-barred. Nothing in the court's June 20, 2013 order is at odds with the Ninth Circuit's May 22, 2013 memorandum decision, nor does the court's June 20, 2013 order demonstrate any bias—let alone "deep-seated favoritism or antagonism"—with respect to the parties in this proceeding. *See Liteky*, 510 U.S. at 555.

IV. CONCLUSION

Based on the foregoing, the court declines to voluntarily recuse itself, and DENIES AFM's motion for recusal (Dkt. # 140). In accord with Local Rule LCR 3(e), the court DIRECTS the clerk of court to refer this motion to the Chief Judge of the Western District of Washington. *See* Local Rules W.D. Wash. LCR 3(e).

Dated this 26th day of June, 2013.

JAMES L. ROBART
United States District Judge